No. 12,986

ed States Court of Appeals
For the Ninth Circuit

ING FOO,

Appellant,

RD MCGRATH, Attorney General
United States,

Appellee.

REPLY BRIEF FOR APPELLANT.

CHOW AND SING,
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Table of Authorities Cited

Cases

Statutes

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opening brief, we stressed the fact that a
ng instituted in the United States District
nder Section 503 of the Nationality Act of
Stat. 1171; 8 U.S.C.A. 903) contemplates a
ovo and not a review of the proceedings had
ne United States Immigration Service. Ap-
his brief, agrees and concedes that such an
a trial *de novo* but disagrees as to the mean-
interpretation of the term "de novo." He
nat question as to the admissibility of the
ion records into evidence in a case of this

(2d) 663, a Montana case, as his authority
record of an administrative hearing should
mitted into evidence. This particular case c
appeal to the county district court of an
decision by the Industrial Accident Board as
by the Workman's Compensation Act of M
The case is not analogous to the situation in t
ent case. It was an appeal where the eviden
mony and records taken before the Industri
dent Board were before the Court for consi
and the Court allowed additional testimony to
duced. Moreover, the language of the Cour
cited case clearly explains that the use of t
"de novo" in the statute is different than it
ally meant. The judge said,

> "While it is true there may be some con
> the statute by the inclusion of the term '
> that confusion has been explained by th
> In Dosen v. East Butte Copper Mining
> Mont. 579, 254 P. 880, the court explai
> the term 'de novo', as used in the st
> not synonymous with the familiar tria
> takes place in a district court on appea
> justice's court."

Appellee brought forth the words of the H
Judge Holtzoff in *Mah Ying Og v. Clark,*
Supp. 696, as indicating that an action under
503 of the Nationality Act incorporates not
evidence taken at the time of the trial, but
reopening and review of the entire admin

ion to the opinion of the learned jurist who

'he 1940 statute, however, contemplates a re-
ing and a full judicial hearing of the entire
of citizenship without confirming it merely
review of the administrative action. In a
as corpus proceeding, the Court might feel
it would have reached a different conclusion
that reached by the administrative agency.
rtheless, it would be constrained to affirm
action of the administrative agency if there
substantial evidence sustaining such action.
n action for a declaratory judgment under
940 Code, however, the Court determines all
e issues de novo." (Italics ours.)

plainly seen that the Court there was differ-
between a habeas corpus proceeding where
t merely reviews the administrative action
oceeding under Section 503 of the Nation-
where the Court determines *all of the issues*
This view was further reiterated by the
Appeals in 187 F. (2d) 199, page 201, when
vas brought to it for consideration.

case of *Pittsburgh S. S. Co. v. Brown,* 171
175, the Court clearly supports this view in

n our view, it is hardly open to question
hat the court below correctly held that plain-
vas entitled to a trial de novo on the issue
nted by its complaint for injunction, and
a trial contemplates what the term implies

the hearing of evidence, as though no action had been taken. Spano v. Weste Growers, Inc., 10 Cir., 83 F.2d 150, 152 Luebeck, 377 Ill. 50, 35 N.E.2d 334, 339 v. Young, Court of Appeals of Ohio, 77 C 20, 65 N.E.2d 399. In the last cited case on page 406 of 65 N.E.2d, stated:

> *'A trial de novo connotes an exami testimony and an independent finding fully as though the action was origina tuted in that court, in which event it immaterial what errors were committ hearing before the board. Also it wou material what the findings of the board*

Thus, we have no difficulty in conclu the court properly refused to receive script of testimony taken before the Dep missioner on the particular issue involved the court's opinion in the Crowell case supports such a conclusion. The court 64 of 285 U.S., page 297 of 52 S. Ct., s

> 'We think that the essential inde of the exercise of the judicial powe United States in the enforcement o tutional rights requires that the fede should determine such an issue upon record and the facts elicited befo (Italics ours.)

We again restate our position set forth in ing brief that if the appellee decides to rely testimony of Wong Gong, then he should be him to testify in Court and not to rely upon

in appellee's power to produce him if he so
particularly if appellee felt the testimony
Gong would help to answer appellant's case.

ee contends that a mere *prima facie* showing
ient to establish one's United States nation-
failed to distinguish the present judicial ac-
n an administrative proceeding as one held
nited States Immigration Service. All the
d by appellee on this phase of his brief were
rpus proceedings and not judicial trials. The
ype of action is a judicial litigation where
two parties, the proponent and the opponent.
nentary that if the proponent makes out a
ie case, not one of moral certainty or beyond
ble doubt, but sufficient to support his allega-
n the burden shifts to the opponent or defend-
swer it. If he does nothing about it, he fails
roponent succeeds.
Whenever litigation exists somebody must go
ith it; the plaintiff is the first to begin; if he
nothing, he fails. If he makes a prima facie
and nothing is done to answer it, the defend-
ails."
nes on Evidence (2d Edition), Section 176.

pellee indulges in the false premise that when
d of Special Inquiry found that appellant is
lood son of his father, Wong Yem, it found
nce that appellant was attempting by fraud
y enter the United States. We see nothing to

of fraud in the pleadings and answer. In
findings of facts and conclusions of law of t
of Special Inquiry did not mention fraud as
for its adverse decision.

We do not wish to burden the honorable C
repetition of our arguments embodied in the
brief. We believe the arguments and author
mitted in that brief aptly cover our posi
answer appellee's contentions.

Wherefore, appellant prays that the jud
the District Court be reversed and that app
adjudged a citizen and national of the Unite

Dated, San Francisco, California,
October 22, 1951.

Respectfully submitted,
CHOW AND SING,
Attorneys for Appel